No. 96-167

(4)

Supreme Court, U.S.
FILED
NOV 12 [illegible]
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF CHICAGO,
Petitioner,
v.
SYLVIA EVANS,
Respondent.

CITY OF CHICAGO,
Petitioner,
v.
BERTHA BALARK, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

SUSAN S. SHER
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON *
Chief Assistant Corporation Counsel
30 N. LaSalle Street
Room 800
Chicago, Illinois 60602
(312) 744-7764
Attorneys for Petitioner
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

10 pp

TABLE OF AUTHORITIES

CASES: Page

Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982) 5
Evans v. City of Chicago, 689 F.2d 1286 (7th Cir. 1982) 2, 3
Evans v. City of Chicago, 873 F.2d 1007 (7th Cir. 1989), cert. denied, 495 U.S. 956 (1990) 2, 3, 6, 7
Evans v. City of Chicago, 10 F.3d 474 (7th Cir. 1993) (en banc), cert. denied, 114 S. Ct. 1831 (1994) 2, 3, 6, 7
Farrar v. Hobby, 506 U.S. 103 (1992) 2
Harrington v. Vandalia-Butler Board of Education, 585 F.2d 192 (6th Cir. 1978) 5
Hensley v. Eckerhart, 461 U.S. 424 (1983) 7
Hewitt v. Helms, 482 U.S. 755 (1987) 2, 5, 6
Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 6
Palmer v. City of Chicago, 806 F.2d 1316 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987) 5, 6
Rhodes v. Stewart, 488 U.S. 1 (1988) (per curiam) 2, 5
Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992) 2-3
Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980) 5
Stewart v. Donges, 979 F.2d 179 (10th Cir. 1992) 5
Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989) 2, 5-6
Ward v. County of San Diego, 791 F.2d 1329 (9th Cir. 1986) 5

STATUTE AND RULES:

42 U.S.C. § 1988 1
Fed. R. Civ. P. 60(b) 3
Sup. Ct. R. 14.1(a) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-167

CITY OF CHICAGO,

Petitioner,

v.

SYLVIA EVANS,

Respondent.

CITY OF CHICAGO,

Petitioner,

v.

BERTHA BALARK, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

Both respondents have ignored the one fact that distinguishes this case from any of the ones they cite in which the courts have awarded attorney's fees under Section 1988. Here, the determination that respondents were "prevailing parties" was made at a time when respondents could point to no judgment of any kind constraining the City's practices in paying its tort judgments. Indeed, the judgment on which they rely to obtain fees—the consent decree—had been vacated because it was based on the

erroneous decision *Evans I* (*Evans v. City of Chicago*, 689 F.2d 1286 (7th Cir. 1982)). Now, although respondents have been in litigation over the City's payment practices for nineteen years, they have absolutely nothing to point to that survived the en banc decision in *Evans III* (*Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993), cert. denied, 114 S. Ct. 1831 (1994))—no declaratory relief, no injunction, no damages, no consent decree. We are, in fact, under no legal compulsion at all to pay our tort judgments in any different manner from the way that we were paying them when this litigation began. These respondents, in short, have failed miserably to obtain "actual relief on the merits of [their] claim[s]" that has "materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). See *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989); *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988) (per curiam); *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987).

To avoid this inevitable conclusion, respondents make no fewer than five attempts to show that they are prevailing parties. First, the Balark plaintiffs assert that "the consent decree here was not based on a mistake of law." Brief of the Balark Respondents in Opposition to Petition for Writ of Certiorari 7 [hereafter "Balark Br."]. This argument appears to be based on some distinction between mistakes of law and rulings that are perceived to be correct when they are entered and later are adjudged to be incorrect—a distinction that escapes us. When Judge Ripple, see *Evans III*, 10 F.3d at 483 (concurring opinion), and the court below in *Evans IV*, see Pet. App. 5a, wrote that *Evans II* (*Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989), cert. denied, 495 U.S. 956 (1990)), had "changed the prevailing law to such a degree as to make further enforcement of the consent decree inappropriate under" *Rufo v. Inmates of the*

Suffolk County Jail, 502 U.S. 367 (1992), what they meant was that *Evans II* had recognized that the equal protection holding in *Evans I* was so completely incorrect that it could not support the consent decree. Certainly neither Judge Ripple nor the panel below could have meant to suggest that between the 1982 decision in *Evans I* and the 1989 decision in *Evans II* the governing law for equal protection claims changed to a significant degree. Indeed, both *Evans I* and *Evans II* applied the well-settled rational basis test. See *Evans I*, 689 F.2d at 1299; *Evans II*, 873 F.2d at 1015. The only change is that *Evans I* got it wrong and *Evans II* got it right. Respondents cannot plausibly argue that the consent decree was not "based on a mistake of law." The consent decree, after all, was based on *Evans I*, see *Evans III*, 10 F.3d at 476-77 (plurality opinion), and *Evans I* was "clearly erroneous." *Evans II*, 873 F.2d at 1016.

Second, the Balark respondents point out that the judgment entering the consent decree was a final judgment. See Balark Br. 9. Evans makes this same general observation. See Brief of the Respondent, Sylvia Evans, in Opposition to Petition for Writ of Certiorari 8. This, of course, is true, but it does not explain why a final judgment based on a mistake of law—in this case *Evans I*—and vacated because it never should have been entered in the first place should be hardy enough to support a fee award simply because it was once entered. Whatever distinction might exist in other cases for final judgments later set aside under Fed. R. Civ. P. 60(b) and orders set aside on direct review, surely it does not exist here, where the reason the judgment was vacated was neither a change in circumstances nor the accomplishment of the purposes of the decree but simply that the court has seen the error of its ways. Respondents seem to concede the correctness of the cases we cite in which fees are denied for an erroneous interlocutory ruling. The rule should be no different for an error that has achieved finality through no fault of the party aggrieved by that ruling.

Third, and along the same lines, the Balark respondents note that simply because a consent decree is vacated "does not mean that it was not valid while it existed." Balark Br. 9. We have no quarrel with this general proposition, although it has nothing whatever to do with this case. This is just more of respondents' refusal to come to grips with the fact that this consent decree was vacated precisely because it was based on an erroneous ruling and, indeed, should never have been entered in the first place. Even respondents do not argue that this consent decree would have been entered but for the court's error in *Evans I*. In common sense terms, that is a consent decree that was not valid while it existed, even though it was not judicially pronounced invalid for several years.

Fourth, the Balark respondents assert that "[t]his lawsuit and its consent decree undisputably [sic] affected the behavior of the City toward the respondents, affording respondents significant relief, . . . and materially altered the relationship of the parties." Balark Br. 12 (citation omitted). If this is meant to describe the period of time during which the consent decree was in effect, of course we quite agree. If it is meant to have any bearing on respondents' entitlement to fees after the consent decree was vacated as based on a mistake of law, then it is simply incorrect. The legal relationship between the City and respondents is the precisely same now as before respondents brought these lawsuits nineteen years ago—except that we have spent inordinate time litigating claims that have been judged worthless and are now res judicata for respondents and any class member who might seek similar relief in the future. Surely that type of alteration in the relationship of the parties should not be rewarded with fees.

Finally, the Balark respondents argue that our test would make the availability of fees turn on a "fortuity." Balark Br. 12-13.[1] But what respondents call a "fortuity"

---

[1] The Balark respondents go so far as to argue that we seek a "windfall." Balark Br. 12. Even if this Court overturns the hold-

is actually the statutory touchstone of prevailing party status. In interpreting that requirement, we do not think it is too much to ask that the plaintiff be able to point to some tangible result in the lawsuit at the time that the district court awards attorney's fees. As we explain in our petition for certiorari, temporary victories are routinely dismissed as insufficient to support a fee award. *E.g.*, *Stewart v. Donges*, 979 F.2d 179, 182 (10th Cir. 1992); *Palmer v. City of Chicago*, 806 F.2d 1316, 1321-23 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987); *Doe v. Busbee*, 684 F.2d 1375, 1381 (11th Cir. 1982); *Smith v. University of North Carolina*, 632 F.2d 316, 352-53 (4th Cir. 1980). Indeed, even success not later branded as error is insufficient if it is illusory. See *Rhodes v. Stewart*, 488 U.S. at 3-4; *Hewitt v. Helms*, 482 U.S. at 760; *Ward v. County of San Diego*, 791 F.2d 1329, 1333-34 (9th Cir. 1986); *Harrington v. Vandalia-Butler Board of Education*, 585 F.2d 192, 198 (6th Cir. 1978). Surely if the plaintiff's "success" is founded, as it was in this case, on a mistake of law, and the success achieved longevity measured only by the length of time that it took the court to recognize and correct its error, the plaintiff has not prevailed. The district court was not obliged to shut its eyes to the fact that it had vacated the decree, and to award fees simply because for a few years the consent decree had life and, therefore, at some point in the past plaintiffs had been "prevailing parties." [2]

---

ing below that respondents are prevailing parties, we will not think ourselves lucky to have been embroiled in this litigation. This case has brought us no sudden and unexpected good fortune. To the contrary, it has taken a long time and considerable energy to extract ourselves from a case that should have been over long ago.

[2] *Texas State Teachers* is not to the contrary. There the Court explained its reasons for rejecting the central issue test applied by the Fifth Circuit, including that it failed to account for success on an issue *pendente lite*. The Court's statement that "Congress cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees," 489 U.S. at 791, was therefore intended to accommodate those cases in which the plaintiff "ha[d] succeeded on any significant claim affording it some of the relief

The Balark respondents offer two grounds in support of their judgment that do not relate to the question decided below, but these are insufficient to insulate the judgment from review. First, they argue that attorney's fees can be awarded in this case on the theory that they were the "catalyst" of what they call a permanent change in the City's payment practices. Tellingly they cite no case from this Court for that proposition—this Court has never embraced the notion of a "catalyst" where a lawsuit was said to have caused a change in the defendant's policies. See *Hewitt*, 482 U.S. at 763. In any event, because this theory was never reached by the court below, and respondents cite only cases from that court, this Court should, at a minimum, vacate the judgment below and remand the case to the court of appeals for its consideration in the first instance of respondents' alternative theory.[3]

Finally, the Balark respondents offer the now legally irrelevant notion that the consent decree should not have been vacated in *Evans III*. Respondents did not make this argument to the court below, and they did not ask that court to depart from the law of the case as established in *Evans II* and *Evans III*. The issue is now waived. Nor may respondents seek reinstatement of the decree without a cross-petition, which they did not file. See this Court's Rule 14.1(a).

---

sought," *ibid.*, other than in the final judgment. Here, respondents have not succeeded on any of their claims.

[3] Respondents presented their catalyst theory to the court of appeals, which did not reach the question. Pet. App. 7a. Yet it is unlikely that the court below reached out to decide the harder question in the case and bypassed a theory under which respondents would easily prevail. In fact, as we explain in our petition, respondents would not be catalysts under the test used by the Seventh Circuit. See *Palmer v. City of Chicago*, 806 F.2d at 1322. Indeed, *Palmer* makes clear that in cases that have concluded on the merits, a plaintiff who has not altered the legal relationship is not a catalyst either. The catalyst theory, to the extent that it means something other than a change in the legal relationship of the parties, is best reserved for those cases in which the plaintiff prevails before judgment on the merits. See, *e.g.*, *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978).

In the final analysis, as *Evans II* and *III* make clear, the consent decree here protected no federal rights and was not necessary to restrain any unconstitutional conduct. Thus, the congressional policy of compensating prevailing parties in civil rights cases is surely not at play when a plaintiff in fact vindicates no federal right. Conversely, there is surely serious violence to our system of federalism when local taxpayers must foot the bill for litigation that accomplished nothing but to restrain their elected officials for years because of the erroneous decision of a federal court. Although the Balark respondents question whether the fee award will really be $1 million, see Balark Br. 14, they do not dispute that this is the amount that they and Evans have asked the district court to award.[4] And although they think that this affront, whether it be $300,000 or $1 million, or something in between, is not important enough to warrant review, it is surely grounds for summary reversal—relief that we explicitly suggested and that neither brief in opposition even discusses.

---

[4] The district court's determination on the fee petitions would be subject to review only for abuse of discretion. See *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 & n.12 (1983).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

SUSAN S. SHER
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON *
Chief Assistant Corporation
Counsel
30 N. LaSalle Street
Room 800
Chicago, Illinois 60602
(312) 744-7764
Attorneys for Petitioner

November 12, 1996

* Counsel of Record